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No. 85-99

In The

Supreme Court of the United States

October Term, 1985

MESSERSCHMITT BOLKOW BLOHM, GmbH.,

Petitioner,

v.

WALKER, *et al.*,

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether, on an application for discovery of evidence located abroad from a foreign national over whom the court has personal jurisdiction, a court in the United States may follow the Federal Rules of Civil Procedure without first resorting to the procedures of the Hague Evidence Convention,* by ordering that the production of the foreign documents take place in the United States.

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*Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature,* March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (entered into force between the United States and Germany on June 26, 1979).

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REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari filed in this cause on behalf of Messerschmitt Bolkow Blohm, GmbH., a German corporation, fails to demonstrate any sufficient reason why the decision of the United States Court of Appeals in the case of *In re Messerschmitt Bolkow Blohm GmbH.*, 757 F.2d 729 (5th Cir. 1985), should be reviewed by this Court. Respondents concede that "the role of the Hague Evidence Convention in United States litigation", as Petitioner phrases the issue, would be a question of some significance, but that is not the true issue raised by this case. Rather, the limited issue presented here is whether prior resort must be made to the

Convention in order to seek discovery from foreign parties subject to the jurisdiction of a United States court, even though the objects of discovery are physically located in the territory of a foreign signatory of the Hague Convention. *Messerschmitt*, 757 F.2d at 731. On this specific issue, there is a clear preponderance of authority, both federal and state, supporting the position of the Fifth Circuit. There is thus no need for this Court to settle any point of widespread disagreement or confusion. Also, the opinion of the Fifth Circuit should not be reviewed as it is demonstrably correct in its ruling: it enforces the language of the Convention itself, gives recognition to the position of the Federal Republic of Germany withholding full recognition to the Convention, and gives proper consideration to relevent principles of comity in this area of international relations.

This action is brought by the survivors and other beneficiaries of three individuals who died in a helicopter crash in April of 1982. The manufacturer of the helicopter, Messerschmitt Bolkow Blohm GmbH, appears in this action as the Petitioner. Also joined as defendant is MBB Helicopter Corporation (MBB), a Delaware and Pennsylvania corporation which is a wholly-owned subsidiary of Petitioner and which serves as the United States distributor of Messerschmitt's helicopters. 757 F.2d at 730. The presence of the American co-defendant should be particularly noted as this fact serves to distinguish the present case from that of *Anschuetz & Co., GmbH. v. Mississippi River Bridge Authority, et al.*, No. 85-98 (Petition for Writ of Certiorari filed July 17, 1985) in which the German defendant had no establishment or personnel in the United States. See *In re Anschuetz & Co., GmbH.*, 754 F.2d 602 (5th Cir. 1985).

Petitioner has admitted personal jurisdiction in the United States District Court for the Northern District of

Texas. 757 F.2d at 730. Nevertheless, Petitioner claims that the district court erred in ordering it to produce in the United States documents in its possession and physically located in Germany and in ordering it to produce for depositions in the United States the persons Petitioner may call as expert witnesses at the time of trial, which experts were designated to be employees of Petitioner residing in Germany. 757 F.2d at 730. Petitioner's position is that the Hague Evidence Convention is the exclusive procedure for obtaining discovery from a foreign national defendant, at least in the first instance.

There is nothing in the language of the Hague Convention demonstrating that it was intended to provide the sort of exclusivity which Petitioner suggests. Instead, the Convention specifically provides, in Article 27, that it "shall not prevent a Contracting State from — (c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention." Also, the Preamble to the Convention states that its purpose is to "improve mutual judicial cooperation in civil or commercial matters," as well as to "facilitate" the transmission and execution of Letters of Request.

Where discovery of documents from foreign parties subject to the jurisdiction of a United States Court is sought, the Federal Rules of Civil Procedure, not the Hague Convention, applies, and this is true "even though those documents are physically located in the territory of a foreign signatory of the Hague Convention." *Messerschmitt*, 757 F.2d at 731, citing *Anschuetz*, 754 F.2d at 611, n. 2. The district court was correct in this ruling, because in this situation the discovery should not be considered as taking place outside of the United States, and the Hague Convention is irrelevant *ab initio*.

If the drafters of the Hague Convention had desired the extreme result which Petitioner urges, they might easily have so indicated in plain language. Instead, there is no language whatsoever that speaks of exclusivity of the Convention's procedures and there is much that indicates the contrary.

> It is conceivable that the United States could enter into a treaty giving the other signatories such great power over American litigation, but a treaty intended to bring about this result surely would state its intention clearly, and surely would be much more precise in setting out such critical terms.

Graco, Inc. v. Kremlin, Inc., 101 F.R.D. 503 (N.D. Ill. 1984). Instead, the Convention enacts a clearly permissive procedure for assisting forum courts in obtaining evidence; it does not purport to limit the preexisting ability of litigants to obtain discovery in their forum courts.

The adoption of the Hague Convention by the United States cannot be interpreted as a restriction of jurisdiction over foreign nationals before a United States Court. Rather, the purpose of the Convention was clearly to enlarge the ability of litigants to obtain evidence from foreign parties in those instances where the forum court may *not* have *in personam* jurisdiction. Petitioner's position leads only to the contrary result: the discovery provisions of the Federal Rules of Civil Procedure would be effectively voided every time a lawsuit involved a litigant of a signatory State.

Despite the many cases cited by the Petitioner on this point, the Petition fails to disclose the type of conflict among the authorities which is normally said to justify review on writ of certiorari. See Supreme Court Rule 17. In particular, there is no conflict among the federal circuit courts of appeal alleged. The Fifth Circuit position, as

evidenced in *Anschuetz* and in the instant case, has not been disputed by any other circuit. It should also be noted that Petitioner's roster of "reported" cases ruling this issue in fact consists primarily of unreported and unpublished opinions, which opinions were never intended for publication, have no precedential value, and, in most instances, cannot be cited as authority in the federal circuits in which they arise. (Petition at 7, n. 7-9).

The closest Petitioner comes to finding a significant conflict among the authorities is in its citation of *Gebr. Eickhoff Maschinenfabrik und Eisengiebrei v. Starcher*, No. 16562 (W.Va. Mar. 22, 1985). But that case was decided almost contemporaneously with the instant case, and neither decision distinguishes the other. Respondents submit that it is clear that the Fifth Circuit position is the correct view of this issue, and that subsequent courts faced with similar issues will undoubtedly choose to follow its reasoning. Until it is shown that the West Virginia position will be followed by any other court, especially in light of the well-reasoned opinions of the Fifth Circuit, there has been shown no conflict among the courts sufficient to command the attention of this Court on writ of certiorari.

Respondent concedes that there are a significant number of cases presenting issues similar to the one raised on this appeal, but far from showing any need for guidance from this Court in this area, the most recent cases clearly show that the federal trial courts are not floundering in a sea of confusion but have instead reached a clear consensus. That consensus is, consistent with the position of the Fifth Circuit, that the Hague Convention is not the exclusive means of obtaining evidence from abroad. See, *e.g.*, *Graco, Inc. v. Kremlin, Inc.*, 101 F.R.D. 503 (N.D. Ill. 1984); *Compagnie Francaise d'Assurance v. Phillips Petroleum Co.*, 105 F.R.D.

16 (S.D.N.Y. 1984); *Cooper Industries v. British Aerospace, Inc.*, 102 F.R.D. 918 (S.D.N.Y. 1984); *Laker Airways Ltd. v. Pan American World Airways*, 103 F.R.D. 42 (D.D.C. 1984); *Slauenwhite v. Bekum Maschinfabrik GmbH.*, 104 F.R.D. 616 (D.Mass. 1985).

Principles of Comity Do Not Require Review of this Case:

No true consideration of comity in international relations is raised by the opinion of the Fifth Circuit in this case. First, it must be remembered that the role of the Hague Convention in effecting discovery in West Germany is highly problematic. That country has declared that it will not allow compulsory pre-trial production of documents "as known in Common Law countries" under the Hague Convention. See Reservations and Declarations of the Federal Republic of Germany on the Adoption of the Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters, 6A Benedict on Admiralty 3-160.4 ff. Thus, even if a first resort to the provisions of the Hague Convention were ordered by this Court, such efforts would in most instances be a futile act.

Were the position of Petitioner to be accepted, there is a far greater likelihood that international comity would be frustrated rather than advanced. *Lasky v. Continental Products Corp.*, 569 F.Supp. 1227 (E.D.Pa. 1983). The history of the Convention clearly indicates that it was designed to supplement, not constrict, the Federal Rules of Civil Procedure. There is absolutely no indication that it was designed to shield foreign defendants from the discovery provisions of the federal rules.

Comity in this context requires the weighing of Germany's interest in maintaining control over its judicial system against the American interest in obtaining full pretrial dis-

covery. *Messerschmitt*, 757 F.2d at 732. The decision of the Fifth Circuit herein gives full weight to the valid American interest and does not genuinely infringe the German interest. As the opinion notes, "The district court's order does not require any governmental action in Germany, any appearance in Germany of foreign attorneys, or any proceedings in Germany." *Id.*, 757 F.2d at 732. Since defendants are admittedly subject to the personal jurisdiction of the American court, requiring them to comply with such orders in aid of discovery is fully compatible with notions of fairness found in many legal systems. Simply put, parties who establish sufficient contacts with a forum so as to engage the jurisdiction of a court of that forum, must expect to comply with the requirements of the legal system of the jurisdiction with whom they have chosen to do business or otherwise establish contacts.

Finally, it should be noted that there is a question of ripeness regarding Petitioner's argument. Insofar as the Petition raises, as a basis for granting the writ, concerns over a trial court's ability "to compel, upon pain of monetary fines or other punishment for contempt, the production of evidence located abroad," the Petition is raising a question which is not yet ripe. (Petition at 15-16). No such order has been entered in this action, nor does the record reflect that one is contemplated. No sanctions or other penalties have been sought or granted. The trial court has only ordered that documents be produced and witnesses deposed.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied, as Petitioner has shown no compelling reason why the case should be reviewed. The role of the Hague Evidence Convention in United States litigation has been definitively, and correctly, set by the Fifth Circuit Court of Appeals.

Respectfully submitted,

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I certify that on this 10th day of September, 1985, three copies each of the foregoing Brief in Response to Petition for Writ of Certiorari were deposited in the United States mail, first-class postage prepaid, addressed to the following counsel of record:

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